

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

FIBER TECHNOLOGIES NETWORKS, L.L.C.
140 Allens Creek Road
Rochester, NY 14618

Complainant,

v.

TOWN OF SHREWSBURY ELECTRIC
LIGHT PLANT
100 Maple Avenue
Shrewsbury, MA 01545-5398

Respondents.

D.T.E. 01-70

MOTION FOR SUMMARY JUDGMENT
OF PLAINTIFF FIBER TECHNOLOGIES NETWORKS, L.L.C.

Pursuant to 220 C.M.R. 1.06(e), Plaintiff Fiber Technologies Networks, L.L.C.

(“Fibertech”) moves for summary judgment against the Defendant Shrewsbury Electric Light Plant (“SELP”). Summary judgment is appropriate because a few undisputed facts established in the pleadings, testimony, and discovery to date frame a stark legal dispute.

First, there is no dispute that Fibertech has an approved tariff on file with the Department, and that it has submitted a Statement of Business Operations. There also is no dispute that Fibertech presently is in the business of providing “dark fiber,” fiber optic cable leased to customers without supplying the electronic equipment needed to transit optical impulses over the fiber. Finally, there is no dispute that SELP has denied Fibertech access to SELP’s poles purportedly on the basis that, because Fibertech is a dark fiber carrier and has not received local

grants of location, it is not a “licensee” and its fiber is not an “attachment” for the purposes of Section 25A and 220 C.M.R. 45.02.

Fibertech is entitled to summary judgment on the basis of these facts because there is no legal support for SELP’s position. At most, the threshold to be “authorized to construct lines or cables upon, along, under and across the public ways” – and therefore a “licensee” under Section 25A – is to be “registered” as a carrier under the Department’s entry framework. The Department’s decision that offering dark fiber constitutes a “telecommunications service” under the Telecommunications Act controls the treatment of Fibertech as a licensee and of its dark fiber as an attachment under Section 25A.

To establish additional thresholds and pick and choose among registered carriers is an invitation to local entry barriers and undermines the DTE’s entry policies and authority over common carriers. While there are open and potentially disputed facts as to SELP’s competitive motives in denying Fibertech access to its poles, just as there are as to the scope of Fibertech’s future plans beyond simple dark fiber, the effect of SELP’s action in delaying Fibertech’s entry in Shrewsbury is unavoidable.

Because there is no genuine issue as to any material fact, Fibertech is entitled to a judgment as a matter of law that SELP’s denial to allow Fibertech access to its poles is unlawful under 220 C.M.R. 45.03(1) and G.L. c. 166, §25A (“Section 25A”). *Cf.* Mass. R. Civ. P. 56(c).¹

Procedural History

After a series of discussions and communications between SELP and Fibertech, on July 19, 2001, SELP formally denied Fibertech access to its poles by letter stating: “Fibertech is not entitled to a grant of location pursuant to G.L. c. 166, §§ 21, 22 and as such, it does not qualify

¹The Massachusetts Rules of Civil Procedure “shall be instructive ...” in proceedings before the DTE. 220 C.M.R. § 1.06(6)(c).

as a licensee pursuant to G.L. c. 166, § 25A.” Attached hereto as Exhibit 1. Because of SELP’s formal denial on July 19, 2001, Fibertech filed a complaint with the Department on August 27, 2001. Attached hereto as Exhibit 2. SELP filed its response on September 17, 2001. Attached hereto as Exhibit 3. The Department conducted a procedural conference on October 18, 2001. At that time, SELP contended that the case “rests upon the Department’s interpretation of the statutory terms; in other words, questions of law” and sought to waive hearings.²

On November 9, 2001, Fibertech submitted pre-filed testimony on behalf of Frank Chiaino, Chief Operating Officer of Fibertech; Mario Rodriguez, Director of Governmental Affairs and Facilities Access of Fibertech; Jennifer Starks, Treasurer and Secretary of ECC Technologies, Inc.; and Scott C. Lundquist, Vice President of Economics and Technology, Inc. SELP filed the testimony of Thomas R. Josie, General Manager of SELP, on November 16, 2001. Both parties each filed three sets of information requests. On November 29, 2001, the parties filed a Joint Motion to Temporarily Suspend the Department’s Procedural Schedule in order to allow the parties to pursue settlement of the dispute. The Department granted the suspension, but the parties could not reach a settlement within the allotted time.

Because a settlement could not be reached by the parties, the case resumed on December 14, 2001. Both parties filed and briefed motions to compel with the Department. The Hearing Officer issued rulings on these motions on February 14, 2002, and these rulings are currently under appeal.³

² *Shrewsbury’s Electric Light Plant’s Comments on Proposed Procedural Schedule, Scope of Proceedings, and Opposition of Fiber Technologies Networks, L.L.C. to Change the Order of Presentation* at p. 2 (filed Oct. 22, 2001). Fibertech declined to waive a hearing, but noted that “[e]ither party is free to move for summary judgment if appropriate.” *Letter to Mary L. Cottrell, Secretary from Cameron F. Kerry* at p. 2 (filed Oct. 22, 2001).

³ *See Appeal of Fiber Technologies Networks, L.L.C. To Hearing Officer’s Ruling on Fiber Technologies Networks L.L.C. Motion to Compel Discovery Responses by Shrewsbury Electric Light Plan*, February 19, 2002; *see also Appeal of Fiber Technologies Networks, L.L.C. To Hearing Officer’s Ruling on Shrewsbury’s Electric Light Plant Motions to Compel Discovery Responses By Fiber Technologies Networks, L.L.C.*, February 19, 2002.

Although two discovery issues remain subject to these appeals, such issues are not material to this motion for summary judgment. SELP has requested that Fibertech produce lease agreements and other information with respect to its customers outside of Massachusetts, and Fibertech seeks a legal opinion concerning the grounds for denying access to poles discussed in materials produced in discovery. The former may show the terms on which Fibertech has offered dark fiber or show other services; they do not alter the simple premise, on the basis of which Fibertech says it is entitled to nondiscriminatory access to SELP's poles and SELP says it is not, that Fibertech offers dark fiber. The latter may show that the stated grounds for SELP's denial of access is pretextual, but does not alter the stated grounds at issue here. Although the open discovery issues may present factual disputes, the pleadings and discovery frame certain fundamental issues in the case that are dispositive. As SELP stated in its response to the complaint, "most of the issues involved in this matter are questions of law." *SELP Response* at ¶ 11, p. 11.

Undisputed Facts

1. Fiber Technologies Networks, L.L.C. ("Fibertech") is a New York limited liability company with a principal place of business at 140 Allens Creek Road, Rochester, NY. *Fibertech Complaint* ¶4; *Prepared Direct Testimony of Frank Chiaino* (filed No. 9, 2001) ("Chiaino Testimony"), p. 1, lines 3-5.

2. Town of Shrewsbury Electric Light Plant ("SELP") is an electric light plant with a principal place of business at 100 Maple Avenue, Shrewsbury, Massachusetts. In addition, to operating a light plant, SELP provides communications and Internet access service through the cable television system it operates in Shrewsbury. It is the only cable television operator in

Shrewsbury. *Fibertech Complaint* ¶5; *SELP's Response* ¶ 5; *Prepared Direct Testimony of Thomas R. Josie* (filed Nov. 16, 2001) (“Josie Testimony”), p.1, lines 14-17.

3. SELP is a “municipal lighting plant” within the meaning of G.L. c. 166, § 25A and 220 C.M.R. 45.02, and, as such, constitutes a “utility” regulated by G.L. c. 166, § 25A, and 220 C.M.R. 45.00, et seq. *Fibertech Complaint* ¶6; *SELP's Response* ¶6.⁴

4. Fibertech has filed with the Department of Telecommunications and Energy (“DTE”) a Statement of Business Operation and proposed tariffs on August 9, 2001. Such tariffs were approved by the Department and became effective on September 8, 2001. Attached hereto as Exhibits 4-6. *Chiaino Testimony*, p. 6, line 21 and Exhibit 3, p. 7, line 1-2 and Exhibits 4 and 5. Fibertech also is certified as a common carrier in New York, Connecticut, Indiana, Pennsylvania, and Wisconsin. *Chiaino Testimony* at p. 7, lines 7-8.

5. Fibertech develops and leases high capacity dark fiber for use by various communications carriers, governments, educational institutions, and businesses. *See Fibertech's Statement of Business Operations*, p. 3. Dark fiber is “[u]nused fiber through which no light is transmitted, or installed fiber optic cable not carrying a signal. It is ‘dark’ because it is sold without light communications transmission. The [carrier] leasing the fiber is expected to put its own electronics and signals on the fiber and make it ‘light.’” *Petition of Global NAPs, Inc. Against New England Telephone and Telegraph d/b/a Bell Atlantic-Massachusetts Regarding Dark Fiber*, D.T.E. 98-116 (April 2000) at 1 n. 1 (quoting Third Report and Order and Fourth Notice of Proposed Rulemaking, *Implementation of The Local Competition Provisions of the*

⁴ Under Section 25A and the DTE regulations, a “utility” is defined as “any person, firm, corporation or municipal lighting plant that owns or controls or shares ownership or control of poles, ducts, conduits, or rights-of-way used or useful, in whole or in part, for supporting or enclosing wires or cables for the transmission of intelligence by telegraph, telephone or television or for the transmission of electricity for light, heat or power.” G.L. c. 166, § 25A, ¶ 1; 220 C.M.R. 45.02.

Telecommunications Act of 1996, CC Docket No. 96-98 at ¶ 162 n. 292 (released Nov. 5, 1999), quoting Newton's Telecom Dictionary 197-98 (14th ed. 1998)).

6. Fibertech first approached SELP for access to poles on June 27, 2000, when Fibertech sent a letter to John Terrasi of Shrewsbury Electric & Cable Co., requesting attachment to certain poles in Shrewsbury. Attached hereto as Exhibit 7. *Josie Testimony*, p. 2, lines 17-18 and Exhibit 1; *SELP's Response to Fibertech's First Set of Information Requests 1-1*.

7. October 2, 2000, Fibertech sent Thomas R. Josie, General Manager of SELP, a letter requesting a pole attachment and agreement and license to attach to SELP's utility poles. Attached hereto as Exhibit 8. *Josie Testimony*, p.3, lines 1-4 and Exhibit 2; *SELP's Response to Fibertech's First Set of Information Requests 1-1*.

8. On October 16, 2000, Mr. Josie prepared a memorandum to Shrewsbury's Light Commission regarding Fibertech. Attached hereto as Exhibit 9. *SELP's Response to Fibertech's First Set of Information Requests 1-1*.

9. SELP sent to Fibertech on November 2, 2000 an outline for a lease of fiber optic cable in Shrewsbury. Attached hereto as Exhibit 10. *Josie Testimony*, p. 3, lines 1-3, 7-14.

10. On May 11, 2001, Fibertech sent Mr. Josie a letter renewing its request for pole attachments. Attached hereto as Exhibit 11. *Josie Testimony*, p.6, lines 12-14, 16-17.

11. On May 15, 2001, Fibertech sent Mr. Josie another letter. Attached hereto as Exhibit 12. *Josie Testimony*, p. 7, lines 15-16 and Exhibit 4; *SELP's Response to Fibertech's First Set of Information Requests 1-1*.

12. In addition, on May 15, 2001, Mr. Josie prepared a memorandum to Daniel J. Morgado, the Town Manager; John I. Lebeaux, the Chairman of the Town of Shrewsbury Board

of Selectmen; and Shrewsbury's Light Commission regarding Fibertech. Attached hereto as Exhibit 13. *SELP's Response to Fibertech's First Set of Information Requests 1-1*.

13. On May 23, 2001, Mr. Josie phoned Fibertech and said to Mario Rodriguez that SELP would "stand basically on the present proposal to Fibertech" whereby "Shrewsbury will own the cables." *Fibertech's Complaint* ¶17; *SELP's Response* ¶17; *Josie Testimony*, p.7, lines 17-19.

14. On June 7, 2001, Fibertech sent SELP a letter making a formal request for access to poles and conduits. Attached hereto as Exhibit 14. *Josie Testimony*, p.7, lines 20-21 and Exhibit 5; *SELP's Response to Fibertech's First Set of Information Requests 1-1*.

15. On July 19, 2001, SELP sent Fibertech a letter denying this request for access pursuant to G.L. c. 166, §§ 21,22 and G.L. c. 166, §25A. Attached hereto as Exhibit 15. *Josie Testimony*, p.8, lines 4-6 and Exhibit 6; *SELP's Response to Fibertech's First Set of Information Requests 1-1*.

Argument

I. Fibertech Is A "Licensee" Within the Meaning of G.L. c. 166, § 25A and 220 C.M.R. 45.02 On the Basis That It Is A Telecommunications Carrier Registered with the Department.

A. The Authority Required By Section 25A Is Solely A Function of DTE Requirements.

Fibertech fits within the definition of a "licensee" because Fibertech has obtained authority from the Department to operate as a common carrier by virtue of filing its Statement of Business Operations and initial tariffs with the Department. A "licensee" is defined by Section 25A and the DTE regulations as "any person, firm or corporation other than a utility, which is authorized to construct lines or cables upon, along, under and across the public ways." G.L. c. 166, § 25A; 220 C.M.R. 45.02. In turn, 220 C.M.R. 5.00, et seq., establishes the complete

requirements to become an authorized telecommunications common carrier in Massachusetts: a carrier must file a Statement of Business Operations and have an approved tariff on file with the Department subject to the Department's approval pursuant to M. G. L. c. 159, § 19. By meeting these requirements, Fibertech is authorized by the Department as a "licensee." *Investigation Into The Regulatory Treatment Of Telecommunications Common Carriers Within The Commonwealth Of Massachusetts*, D.P.U. 93-98 at p. 7 (May 11, 1994)("Any common carrier that has an approved tariff on file with the Department, and that has submitted a Statement of Business Operations, will be considered a 'registered' common carrier in the Department's new framework"). No authority is required other than this.⁵

Under Massachusetts law, "[g]eneral supervision and regulation, and jurisdiction and control over, common carriers furnishing supplies or rendering services to the public within the Commonwealth" have been conferred on DTE, and this regulatory power "is an inherent attribute of the sovereignty of the State" *See New England Tel. & Tel. Co. v. City of Brockton*, 332 Mass. 662, 667, 668 (1955). By doing so, the Legislature "supersede[d]" the authority of local boards, "insuring uniformity in all matters connected with common carriers including ... the transmission of intelligence ... by means of telephone or telegraph lines, or any other system of communication." *Id.* at 668. Thus, state law does not confer any authority on the Town of Shrewsbury, much less on an electric light plant, to decide who is a "licensee" within the meaning of Section 25A.

⁵ The Department has recognized on several occasions that a carrier may do business as a private carrier. *E.g.*, *IntraLATA Competition*, D.P.U. 1731 at pp. 85-87 (1985); *Petition of Massachusetts Institute of Technology*, D.P.U. 86-13 (1986). Section 25A does not by its terms refer to common carriers, and whether a private carrier also is entitled to access to poles, conduits, ducts, and rights-of-way pursuant to Section 25A is not presented by this motion for summary judgment.

B. SELP's Rationalizations For the Denial of Access Would Foster Entry Barriers Inconsistent With the Purpose and Language of Applicable Law.

SELP nevertheless interposes itself or the town to second-guess the DTE's entry requirements. SELP claims that Fibertech is not "authorized to construct lines or cables upon, along, under, or across the public ways" within the definitions of "licensee" because Fibertech's dark fiber does not transmit intelligence and because, as a wholesale carrier, Fibertech does not provide telephone, telegraph, or cable services to end users;⁶ that Fibertech is not a common carrier;⁷ and that Fibertech must first obtain local grants of location,⁸ but that Fibertech does not qualify for such grants of location pursuant to G.L. c. 166, §§ 21 and 22.⁹ (Presumably if the Town of Shrewsbury did issue such grants of location, SELP would still reserve the right to second-guess whether Fibertech is a "licensee" nevertheless.)¹⁰

Such layers of review are inconsistent with the "inherent attribute of the sovereignty of the State." They achieve neither the "uniformity" intended in establishing the Department's authority, nor the efficient competitive entry intended when the Department eliminated certification hearings in D.P.U. 93-98. Instead, they facilitate the kinds of local barriers to telecommunications entry that Section 25A and Sections 224 and 253 of the Telecommunications Act are intended to prevent¹¹ and that Commissioner Vasington has recognized remain a continuing problem.¹²

⁶ *Shrewsbury's Electric Light Plant Response* at ¶¶32-33, September 17, 2001.

⁷ *Id.* at ¶7 (allegation).

⁸ *Id.* at ¶¶32-33.

⁹ *Id.*

¹⁰ If SELP genuinely believes Fibertech's contracts are "one-on-one" and therefore incompatible with common carriage (SELP Response at ¶ 8), its remedy is not to delay entry. Rather – assuming it has standing – its remedy is a complaint alleging unjustly discriminatory or unduly preferential rates pursuant to G.L. c. 159, § 14. See D.P.U. 93-98 at p.7 (tariff regulation and consumer protection, not entry regulation, are the Department's primary tools); *cf. City of Brockton, supra*, 332 Mass. at 669 (city should have claimed discount in tariff proceeding, not imposed it as a condition on grant of location).

¹¹ Report and Order, *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules Governing Pole Attachments*, CS Docket No. 97-151 at ¶ 2 (rel. Feb. 6, 1998) (Section 224 enacted "to ensure that the deployment of communications networks and the development under

SELP's justifications are inconsistent with the statutory scheme of common carrier regulation and inconsistent with analysis of G.L. c. 166, §§ 21, 22. The latter provisions do not add any different or additional entry requirements to those of the Department, but simply refer to carriers authorized by the DTE and authorize such carriers to place facilities in the public ways. G.L. c. 166, § 21 provides that "[a] company incorporated for transmission of intelligence by electricity or by telephone, whether by electricity or otherwise, ... may, under this chapter, construct lines for such transmission upon, along, under and across public ways" The terms of this statute are closely parallel to those of G.L. c. 159, § 12, which establishes the Department's regulatory supervision over "companies" and other entities that provide "[t]he transmission of intelligence within the commonwealth by electricity, by means of telephone or telegraph lines or any other method or system of communication" Thus, Section 21 establishes general authority for carriers regulated by DTE to occupy the public ways, subject to specific grants of location under Section 22 and the general constraint that such use not "incommode public use" or "endanger navigation. *See Boston Edison Co. v. Board of Selectmen of Concord*, 355 Mass. 79, 87 (1968). Nothing in these provisions makes this general authority contingent on obtaining grants of location, as SELP suggests. *See SELP's Response* ¶¶ 32-32 ("for Fibertech to be licensed to construct lines in the public way it must seek grants of location (GOL) from the Board of Selectmen ..."). It was to supersede the authority of local boards with DPU/DTE authority and uniformity that the system of grants of location in G.L. c. 166 §§ 21 and 22 was enacted. *See City of Brockton, supra*, 332 Mass. at 668.

the Telecommunications Act of 1996 of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers").

¹² Remarks of Paul Vasington, Commissioner, Presented at the Mass Insight Conference on Infrastructure (Dec. 12, 2000) ("There are potential municipal barriers that must be removed"), <<http://www.massbroadband.com/spotlight.htm>>>.

In arguing that Fibertech is not authorized to construct facilities in the public ways, SELP focuses exclusively (and, as demonstrated in Part II, erroneously) on the word “transmission” as used in G.L. c. 166, § 21. Section 21, however, applies to a kind of entity, “[a] company incorporated for the transmission of intelligence...,” not to the “transmission of intelligence” alone. This section is part of a statutory scheme, Chapter 166, governing one category of entities regulated by DTE, telephone and telegraph companies. That chapter in turn is one in a sequence of chapters covering other entities regulated by DTE. The Department’s authority extends not just to communications by telephone lines or telegraph lines but to “any other system or method of communications as well” G.L. c. 159, § 12. In *City of Brockton*, the SJC incorporated this language in describing the system of grants of location as applying to “all matters connected with common carriers” and, in addition to telephone and telegraph, “any other system of communication.” 332 Mass. at 668. Taken in full context, therefore, Section 21 encompasses at least all carriers of all communications regulated by DTE.

More recently, the Appeals Court read the definition of “common carrier” in the context of wiretap statute “so as to preserve in its intrinsic intended scope and maintain its viability in the broad run of cases ...” and “in a manner that more closely reflects the reality of the telecommunications industry as it exists today, not as it existed two decades ago.” *Dillon v. MBTA*, 49 Mass. App. Ct. 309, 314, 315 (2000)(quoting decision below, 8 Mass. L. Rptr. 280, 1998 WL 128998 (Mass. Super., 1998)).

Measured against the realities of the telecommunications industry today, SELP’s claim that Section 25A encompasses only entities that provide retail service to end-users is nothing short of fatuous. See *SELP Response at ¶ 5* (Fibertech “currently does not provide service to any consumer end-users.”); ¶ 8 (Fibertech is not a common carrier because it is a “carrier’s carrier”);

Josie Testimony at p.10, lines 4-8 (asking “Do you provide phone service or CATV services?”). It would write out of the statute the entire category of “carriers’ carriers” that make up a vital component of expanding competition in the telecommunications industry. *See Brief of Verizon Massachusetts*, D.T.E. 1-31, Alternative Regulation at p. 16 n. 9 (filed Feb. 12, 2002) (“facilities based competitors have also constructed extensive fiber networks, including SONET rings in major business centers and industrial parks”). The Telecommunications Act of 1996 specifically contemplates wholesale carriers. *See* 47 U.S.C. § 257(c) (requiring ILECs to act as wholesale carriers for CLECs); *Joint Explanatory Statement of Committee of Conference* at p. 1 (1996) (definition of “telecommunications service” intended to include not only service “directly to the public” but “to such classes of users as to be effectively available to the public”). The broad, non-prescriptive directives of Chapters 159 and 166 are no less adaptable than federal law to today’s marketplace.

Accordingly, there is no requirement for a person to become “authorized to construct lines or cables upon, along, under and across the public ways” other than – at most – to be a “registered” carrier with the Department. Once Fibertech obtained such authority, any basis SELP had to deny access to its poles vanished.

II. Department Precedent Establishes That Fibertech Is A “Provider of Telecommunications Service” Within The Meaning of 47 U.S.C. § 224.

The Federal Pole Attachment Act of 1978 was amended by the Telecommunications Act of 1996 to authorize the Federal Communications Commission (“FCC”) to regulate the rates, terms, and conditions for pole attachments, ducts, and conduits by “telecommunications providers,” and to establish an affirmative obligation on the part of utilities to provide access to these facilities ¹³ In Massachusetts, G.L. c. 166, § 25 25A and 207 C.M.R. 5.00 et seq. were

¹³ Pub. L. 104-104, 100 Stat. 56, § 703, codified at 47 U.S.C. § 224.

adopted to implement the authority delegated to the states under this provision. D.T.E. 98-36-A at p. 2 (July 24, 2000) (“The regulations adopted by this Order exercise the authority granted by Federal Pole Attachments Act ...”), *reversed in part on other grounds Greater Boston Real Estate Board v. Massachusetts Department of Telecommunications and Energy* (2001 WL 880845 (Mass. Super. July 25, 2001), *appeal pending*, Mass. App. Ct. Docket No. P1468 (docketed October 17, 2001)).¹⁴ Thus, when the Department extended its regulations to provide in 207 C.M.R. 45.01 and 45.03 for “nondiscriminatory access to poles, ducts, conduits, and rights-of-way” owned or controlled by utilities, it acted to conform Massachusetts regulation in this area to federal law and “to effect legislative intent” in the Telecommunications Act of 1996. *Id.*

In this light, a “licensee” under Section 25A is at least co-extensive with “a provider of telecommunications service” and “telecommunications carrier” under Section 224. Otherwise, the Department would fail to effect the intent of the 1996 Act, and state regulation would leave a gap to be regulated by the FCC.

In turn, controlling Department precedent, affirmed by the United States District Court for the District of Massachusetts, establishes that dark fiber is a “telecommunications service” within the meaning of the 1996 Telecommunications Act. *Petition of Global Naps, Inc. against New England Telephone and Telegraph d/b/a Bell Atlantic-Massachusetts Regarding Dark Fiber*, D.T.E. 98-116 (April 2000), *affirmed sub nom. Global NAPs, Inc. v. D.T.E.*, 156 F. Supp. 2d 72 (D. Mass., July 11, 2001). Just as SELP does here, Global NAPs argued that offering of

¹⁴ 47 U.S.C. § 224(c) permits states to certify that they regulate rates, terms, and conditions and access to poles, ducts, conduits, and rights-of-way, and preempts FCC jurisdiction “in any case where such matters are regulated by the state.” “Such matters” refers in part to “subsection (f),” 47 U.S.C. § 224 (f) added by the 1996 Act, which establishes the obligation of a utility to provide “a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.” Thus, if the DTE did not regulate nondiscriminatory access to these facilities on the part of telecommunications carriers, the FCC would retain jurisdiction to regulate in Massachusetts.

dark fiber constitutes provision of a “passive facility” and not services because it does not include the transmission facilities, which are supplied by the customer. *See D.T.E. 98-116* at p. 5. On this basis, Global NAPS contended, Bell Atlantic-Massachusetts was not barred by Section 271 of the 1996 Act from offering dark fiber across LATA boundaries (prior to Verizon receiving Section 271 authority in Massachusetts).

The Department rejected this argument. It relied on the FCC’s finding in its “*Dark Fiber Order*,” *In the Matter of Applications for Authority Pursuant to Section 214 of the Communications Act to Cease Providing Dark Fiber Service*, 8 FCC Rcd 2589, 2593 (1993), that dark fiber is a “communications service” and found the latter, pre-1996-Act term interchangeable with the definition of “telecommunications service” in the 1996 Act. *Id.* at pp. 8-10. It also relied on the FCC’s “*Safeguards Order*,” Second Order on Reconsideration, *In The Matter of Implementation of The Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended*, 12 FCC Rcd 8653 (1997), finding that “the ordinary leasing of network facilities is a communications Service.” *Id.* at p. 9. In affirming this order, the United States District Court upheld “the DTE’s finding that the leasing of dark fiber constitutes a telecommunications service.” 156 F.Supp. at 79.

The Department reflected the same conclusion when its Telecommunications Division Director wrote that “I can confirm that the Department considers the wholesale provision of dark fiber to be a common carrier telecommunications service subject to our authority.” Letter to Alan D. Mandl from Michael A. Isenberg, Director, Telecommunications Division (Oct. 20, 1999), attached as Exhibit 16. Under controlling authority, therefore, dark fiber in Massachusetts indisputably is categorized as a telecommunications service. As a corollary, a dark fiber carrier is a “licensee” under Section 25A.

III. Dark Fiber is an “Attachment” for Purposes of G.L. c. 166, §25A Because It is Used to Transmit Information.

Fibertech’s dark fiber is an “attachment” as defined by Section 25A because it meets the explicit definition set forth in Section 25A. This provision defines an attachment as “any wire or cable for transmission of intelligence ... installed upon any pole ... or telephone duct or conduit owned or controlled, in whole or in part, by one or more utilities.” Dark fiber is “wire or cable for transmission of intelligence” regardless of whether Fibertech supplies the electronics that transmit light impulses. As with the definition of “licensee” SELP only focuses on the single word “transmission.” However, the definition of “attachment” under 25A must be taken as a whole. The definition states that an attachment is “*any wire or cable* for transmission of intelligence” (emphasis added). Dark fiber is clearly a wire and/or cable which is used in the transmission of telecommunications signals. “Dark fiber permits the transmission of information” *FCC Dark Fiber Order* at ¶ 17.

The Department has discretion to “interpret and apply the term ‘attachment’ where appropriate, in order to include a range of both existing and new technologies – consistent with the goals for meaningful competition and to ensure technologically neutral access.” D.T.E. 98-36-A at p. 40. In determining what technology constitutes an “attachment” under Section 25A, “the Department will look to the language of the statute as well as the purpose which the statute seeks to accomplish.” *Id.* at p. 41. Dark fiber is a new technology within both the language and the purpose of the statute. *Cf. National Cable & Telecommunications Association v. Gulf Power Co.*, 534 U.S. ____, 122 S.Ct. 782, 784 (whatever the scope of agency authority to say that *any* attachments by entities entitled to access to utility poles, the attachments at issue “fall within the heartland of the Act”).

In its response, SELP relied on the decision in *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir., 2000). *See SELP's Response*, ¶7, p. 10. Since then, the Eleventh Circuit's decision concerning the scope of an "attachment" under the federal Pole Attachments Act has been rejected soundly by the Supreme Court in *National Cable & Telecommunications Association v. Gulf Power Co.*, *supra*. The Supreme Court majority observed that the utilities' position in that case "would defeat Congress' general instruction to the FCC to 'encourage the deployment' of broadband Internet capability and, if necessary, 'to accelerate deployment of such capability by removing barriers to infrastructure investment.'" 122 S. Ct. at p. 789. On the same basis, Justice Thomas agreed it is likely that the FCC has authority to regulate rates for commingled cable and Internet access attachments. *Id.* at pp. 792-794. (Thomas, J., concurring in part and dissenting in part.)

SELP's position in this case likewise would discourage the deployment of broadband capability. To exclude competition may prove, if this case goes beyond summary judgment, to have been SELP's intent, "magnify[ing] the unreasonableness"¹⁵ of the denial of access. While SELP's intent may be a question for another day, the impact of its actions and claims unmistakably is to frustrate the "opening of markets and expanded choice" that is the goal of the Department's pole attachment regulations. *See D.T.E. 98-36-A* at p. 1.

Conclusion

The undisputed facts establish that SELP unlawfully denied Fibertech nondiscriminatory access to its poles. The testimony of Thomas Josie acknowledges that if Fibertech is engaged in the transmission of intelligence, "SELP would have to negotiate a standard pole attachment

¹⁵ *Marcus Cable Associates, L.P. v. Texas Utilities Electric Co.*, FCC DA 92-1527 at p. 8 ¶ 20 (rel. July 21, 1997)(applying Pole Attachment Act where direct competition likely between cable operator and utility).

agreement at the standard annual pole attachment rate.” *Josie Testimony* at p. 10, lines 4-7.

Fibertech asks that the Department enter summary judgment in its favor on its complaint, and order SELP to enter into a standard pole attachment agreement with Fibertech at SELP’s standard annual pole attachment rate.

Respectfully submitted,

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